Choice of Law or Statutory Interpretation?: The Fair Labor Standards Act Applied Overseas *Cruz v. Chesapeake Shipping Inc.*

INTERNATIONAL LAW - Foreign seamen employed on vessels engaged in foreign operations entirely outside of the United States did not become subject to the Fair Labor Standards Act under a statutory interpretation analysis. *Cruz v. Chesapeake Shipping Inc.*, 932 F.2d 218 (3rd Cir. 1991).

In 1938, Congress enacted the Fair Labor Standards Act (FLSA) to guarantee the minimum wage to every employee who qualifies.[1] In section 206(a)(4), the Act specifically guarantees the right to minimum wage to seamen employed on American vessels.[2] Unfortunately, the statutory language of this section leaves open to debate the extraterritorial coverage of the FLSA when the ship is a foreign vessel, transitorily reflagged with the American flag.

Today, parties often litigate to determine whether the benefits of an American statute may be exercised extraterritorially.[3] While scholars concede that Congress has the authority to enforce its laws beyond territorial boundaries, U.S. courts are very reluctant to apply an American statute extraterritorially. When determining whether an American statute will be used overseas, the two methods utilized by the courts are the choice of law and statutory interpretation approaches.[4]

A court, in deciding a choice of law issue, first identifies the rules of law of the countries having contact with the case. The court then chooses the nations' law which best satisfies the interests of the countries and the needs of the parties.[5] In contrast, a court using a statutory interpretation analysis does not weigh the contacts of each country with the case, but rather looks to the wording of the American statute to see if Congress intended the statute to be used overseas.[6] One author has stated that the intent of Congress is to be "gathered from the

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1. *See* 29 U.S.C.A. § 206(a) (West 1978).
2. *See* 29 U.S.C.A. § 206(a)(4).
3. *See infra* note 34.
4. *Id.*
5. DAVID F. CAVERS, THE CHOICE OF LAW. SELECTED ESSAYS, 1933-83. 427 (1985).
6. F. A. R. BENNIAN, STATUTORY INTERPRETATION. CODIFIED, WITH A CRITICAL COMMENTARY 673 (1984).

language used [in the statute]."[7] This casenote suggests that the recent Third Circuit decision, *Cruz v. Chesapeake Shipping Inc.*,[8] is correct in holding that statutory interpretation is the appropriate analysis to determine whether the FLSA is applicable to foreign seamen employed on temporarily reflagged vessels operating entirely outside the United States, its waters, and territories.

This casenote will be organized as follows: first, a description of the facts leading up to the case; second, a brief history of the FLSA and its role in the international arena; third, an overview of the rulings of the district court and the Third Circuit; fourth, an examination of the Third Circuit's opinion; and finally, a concluding paragraph stating that the Third Circuit properly employed a statutory interpretation analysis.

I. FACTUAL BACKGROUND OF THE CRUZ DECISION

In 1980, war broke out between Iran and Iraq.[9] This war threatened to disrupt neutral shipping operations in the Persian Gulf. Consequently, in 1986, the U.S. government, after consulting with the Secretary of Defense, the Secretary of State, and the National Security Advisor, allowed eleven Kuwaiti oil and liquefied gas tankers which were crewed by Filipino seamen to be reflagged with the American flag so that the ships could be protected by American naval forces in the Persian Gulf.[10]

Under American law, the reflagging of the Kuwaiti ships had to comply with U.S. maritime laws requiring American ownership of the vessels,[11] adherence to safety regulations, and fulfillment of manning requirements.[12] Following the reflagging of the ships, the eleven vessels

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7. *Id.*

8. 932 F.2d 218 (3rd Cir. 1991).

9. Matthew J. Ferretti, Note, *The Iran-Iraq War: United States Resolution of Armed Conflict*, 35 VILL. L. REV. 197, 197-204 (1990).

10. Cruz v. Chesapeake Shipping Inc., 738 F. Supp. 809, 810 (D. Del. 1990).

11. 46 U.S.C. § 12102 (1987). The principal defendant, Chesapeake Shipping Inc., was chartered on May 15, 1987, under the laws of Delaware for the specific purpose of satisfying the American ownership requirement.

12. 46 U.S.C. § 8103 (1987). The reflagged ships were crewed by Filipino seamen. Presently, section 8103(b)(1) requires that each unlicensed seamen be a U.S. citizen or an alien lawfully admitted to the United States for permanent residence with a limitation of twenty-five percent placed on the number of aliens. However, at the time the tankers were reflagged, 46 U.S.C. § 8103(b) permitted the use of non-U.S. citizen crew members while a vessel was on a foreign voyage and did not stop at a U.S. port. Thus, pursuant to the version of section 8103(b) in effect at the time, the reflagged tankers were permitted to retain their unlicensed Filipino crewmen. *Cruz*, 932 F.2d at 221.

crewed by Filipino seamen operated uninterrupted in their shipping routes under the protection of a U.S. Navy escort in transporting petroleum between the Persian Gulf and Europe, the Mediterranean, and the Far East. None of the reflagged vessels ever entered a U.S. port.[13]

Subsequently, the Filipino seamen employed on the reflagged vessels brought suit in U.S. district court claiming that they were entitled to minimum wages and benefits under the FLSA.[14] On its face, the FLSA provides protection of minimum wage to all seamen employed on American vessels involved in commerce or an enterprise engaged in commerce.[15] In *Cruz*, the question became whether the FLSA could be applied to foreign seamen employed on American reflagged vessels operating outside of the United States and its waters. Because the district court struggled with the idea of applying the FLSA overseas in this particular case, an examination of the history of the Act is helpful to understand the district court's dilemma.

II. LEGISLATIVE HISTORY OF THE FAIR LABOR STANDARDS ACT

In *Cruz*, the district court struggled with idea of applying the FLSA overseas. This struggle stems from the history of the FLSA and annotated case law. The FLSA's history suggests that Congress intended the Act to apply only within the territorial boundaries of the United States. Furthermore, U.S. courts often impose a presumption against extraterritorial application of the FLSA. As will be illustrated, however, the facts of *Cruz* do not lend themselves to the application of this presumption.

A. *History of the Fair Labor Standards Act*

The FLSA was enacted to protect against unfair labor practices in the United States. "Except perhaps for the Social Security Act, . . .

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13. *Cruz*, 932 F.2d at 223.

14. *Id.* at 219.

15. The relevant part of 29 U.S.C.A. § 206(a)(4) of the FLSA states:

(a) Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates: . . .

(4) if such employee is employed as a seaman on an American vessel, not less than the rate which will provide . . . for the period covered . . . wages equal to [the minimum wage].

[the FLSA] is the most far-reaching, far-sighted, program for the benefit of workers ever adopted here or in any other country."[16] Thus, in 1938, President Roosevelt signed a statute that has affected millions of workers, has been the source of vigorous support and opposition, and has withstood many court challenges.[17]

The real beginning of the FLSA occurred in New Zealand in 1894 and in Australia in 1896.[18] Programs were started in these countries to establish minimum wage rates for certain categories of workers.[19] Later, England enacted a similar statute in 1909.[20] After the apparent success of the European acts, the United States began passing statutes at the state level, beginning with Massachusetts in 1912.[21]

After the individual states developed minimum wage and hour statutes, President Roosevelt started advocating federal legislation to regulate these matters.[22] In 1933, President Roosevelt announced that "as the Depression continued and unemployment increased, it became apparent that such things as hours and conditions of labor . . . and minimum wages could not be entrusted solely to individual bargaining or even collective bargaining, but required public protection."[23] In 1937, President Roosevelt argued that "[a] self-supporting and self-respecting democracy can plead no justification for the existence of child labor, no economic reason for chiseling workers' wages or stretch-

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16. Willis J. Nordlund, *A Brief History of the Fair Labor Standards Act*, 39 Lab. L.J. 715 (1988), *citing* 1938 FRANKLIN D. ROOSEVELT, *The Continuing Struggle for Liberalism*, PUBLIC PAPERS AND ADDRESSES 392 (1941).

17. Nordlund, *supra* note 16, at 715.

18. "The origins of the FLSA can be found in New Zealand, Australia, and England in terms of modern history, even though there are roots that can be traced back to the 'Black Death' that decimated one-third of England's population. Beginning in 1349, England initiated a great deal of Statutes of Laborers that regulated wages and other conditions of employment." Nordlund, *supra* note 16, at 716. It is significant that these efforts were primarily maximum wage standards enacted for the benefit of employers rather than workers. The purpose of the Statutes of Laborers was to restrain wage gains in severe labor shortage situations. Nevertheless, the precedent of government involvement in labor standards regulation dates back at least six centuries. *Id.*

19. *Id.*

20. *Id.*

21. Nordlund, *supra* note 16, at 716, *citing* LOUIS D. BRANDEIS, THE CONSTITUTION AND THE MINIMUM WAGE: DEFENSE OF THE OREGON MINIMUM WAGE LAW BEFORE THE UNITED STATES SUPREME COURT 6 (1916).

22. *See*, Nordlund, *supra* note 16, at 719.

23. Nordlund, *supra* note 16, at 719, *citing* 2 FRANKLIN D. ROOSEVELT, *The Year of Crisis: 1933*, PUBLIC PAPERS AND ADDRESSES 205 (1938).

ing workers' hours."[24] Thus, President Roosevelt laid the groundwork for the FLSA.

President Roosevelt realized that some members of the voting public would object to federal regulation of private industry minimum wage and hour standards. He attempted to quell these objections by stating that "[a]ll but the hopelessly reactionary will agree that to conserve our primary resources of man power, government must have some control over maximum hours, minimum wages, the evil of child labor, and the exploitation of unorganized labor."[25]

Aside from the minimum wage laws enacted in other countries and at the state-level in the United States, another major influence in the statutory framework of the FLSA was the National Industrial Recovery Act of 1933 (NIRA).[26] Like the FLSA, the NIRA established codes of fair practice that included minimum wage standards. But even more significantly, Congress learned from the NIRA that in order to be effective, an act needed a simple and efficient enforcement program.[27] Unfortunately, the NIRA failed on this point. Instead of being incomplex, enforcement of the NIRA was very complicated, thereby injuring its forcefulness.[28] The NIRA was declared unconstitutional in 1935, but the major legislative provisions that became the FLSA were derived from the NIRA.[29]

Two years after the NIRA was declared unconstitutional by the U.S. Supreme Court, President Roosevelt notified Congress that he wanted to promote a bill that considered hours standards and minimum wage issues.[30] Using experience gained from the complex NIRA, Congress attempted to incorporate a simple enforcement program into the FLSA. On June 25, 1938, the President signed the FLSA into law. The FLSA became effective on October 24, 1938.[31]

Once the FLSA was signed, the government developed an administrative structure for implementation. Despite the efforts of Con-

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24. Nordlund, *supra* note 16, at 719, *citing* 1937 FRANKLIN D. ROOSEVELT, *The Constitution Prevails,* PUBLIC PAPERS AND ADDRESSES 210-211 (1941).

25. Nordlund, *supra* note 16, at 719, *citing* House of Representatives, Committee on Education and Labor, *Hearings,* "Message to the Congress of the United States from President Franklin D. Roosevelt," July 6, 1937, USGPO, Washington, D.C. p.2.

26. *See,* Nordlund, *supra* note 16, at 720.

27. *Id.*

28. *Id.*

29. *Id.* at 719.

30. *Id.* at 720.

31. *Id.* at 721.

gress to draft a simple, clear document, one of the most difficult problems with the FLSA has turned out to be whether certain segments of industry are covered by the Act.[32] Scholars have noted that the FLSA is vague in defining coverage.[33] This phenomenon made it very difficult for the *Cruz* court to determine the effects of the Act on Filipino seamen employed on the American reflagged vessels which operated outside the United States.

B. *Case Law: Establishing a Presumption Against Extraterritorial Application*

It is well-established in American case law that all congressional legislation is presumed to apply only within the territorial jurisdiction of the United States.[34] This presumption is vital because it serves to protect against unintended clashes between our laws and those of other nations which could result in international discord.[35] Therefore, at the initial stages of analysis a court will assume that the FLSA applies only within the United States.

1. *Pfeiffer v. Wm. Wrigley Jr. Company*

In *Pfeiffer v. Wm. Wrigley Jr. Co.*, the Seventh Circuit established the presumption against the extraterritorial application of the FLSA.[36] John Pfeiffer was hired in 1974 in Chicago by Wm. Wrigley Co. to be the Director of the company's Eastern European office.[37] Later, he was transferred to Munich, Germany, where he continued to do similar office work. In 1983, however, when he turned sixty-five, Pfeiffer was fired. Pfeiffer brought suit pursuant to the Age Discrimination in Employment Act.[38] The Seventh Circuit ruled that Pfeiffer could not use the Age Discrimination in Employment Act as a basis for his suit because he worked outside of the United States.[39]

The Seventh Circuit's rationale for its holding was that Congress did not intend for the Age Discrimination in Employment Act to be

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32. *Id.* at 723.

33. *Id.*

34. *See generally*, EEOC v. Arabian Oil Co., 111 S. Ct. 1227, 1230 (1991); Foley Bros. Inc. v. Filardo, 336 U.S. 281, 284-85 (1949); Benz v. Compania Navera Hidalgo, S. A., 353 U.S. 138, 142 (1957).

35. *See* McCulloch v. Sociedad Nacional, 372 U.S. 10, 20-22 (1963).

36. *See* Pfeiffer v. Wm. Wrigley Jr. Company, 755 F.2d 554 (7th Cir. 1985).

37. *Id.*

38. *Id.*; *see generally* 29 U.S.C.A. § 621 (West 1978).

39. *Pfeiffer*, 755 F.2d at 555.

applied extraterritorially. The Age Discrimination in Employment Act provides that it shall be enforced in accordance with the procedures provided for in section 216 of the FLSA.[40] The relevant text of section 216(d) of the FLSA provides that "no employer shall be subject to any liability or punishment under this chapter . . . with respect to work heretofore or hereafter performed in a workplace to which the exemption in section 213(f) is applicable."[41] Section 213(f) states that the FLSA "shall not apply with respect to any employee whose services during the work-week are performed in a workplace within a foreign country."[42] The Seventh Circuit noted that other jurisdictions have held that, when read together, these statutes stand for the principle that certain portions of the Age Discrimination in Employment Act and the FLSA cannot be utilized by an employee who works outside of the United States. Based upon its interpretation of the FLSA, the Seventh Circuit created a presumption against the extraterritorial application of the Act.[43]

In *Pfeiffer*, the Seventh Circuit also stated its policy reasons for establishing the presumption against extraterritorial application of the FLSA. First, the Seventh Circuit noted that courts dislike outright collisions between domestic and foreign law and seek to avoid them.[44] Second, the Seventh Circuit stated that "it is more plausible to interpret a statute of the United States as having reach beyond the territory when it is international in focus like the Trading with the Enemy Act."[45] The Seventh Circuit determined that the Age Discrimination in Employment Act and the FLSA had no such international purpose.[46]

Finally, the Seventh Circuit cited *Vermilya-Brown Co., Inc. v. Connell*[47] to illustrate Congress' intent to forbid extraterritorial application of the FLSA. In that case, the Supreme Court considered whether the FLSA covered employees working on a U.S. military base in Bermuda. Ultimately, the Court held that the leased base area was a possession of the United States and was covered by the FLSA; therefore, the em-

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40. 29 U.S.C.A. § 626(b) (West 1982).

41. 29 U.S.C.A. § 216(d) (West 1978).

42. 29 U.S.C.A. § 213(f) (West Supp. 1992).

43. *See Pfeiffer*, 755 F.2d at 555; Thomas v. Brown & Root, Inc., 745 F.2d 279, 281 (4th Cir. 1984); Zahourek v. Arthur Young & Co, 750 F.2d 827 (10th Cir. 1984).

44. *See Pfeiffer*, 755 F.2d at 557; *Foley Bros, Inc.*, 336 U.S. at 285.

45. *Pfeiffer*, 755 F.2d at 558.

46. *Id.*

47. Vermilya-Brown Co., Inc. v. Connell, 335 U.S. 377 (1948) (this case took place before section 213(f), the foreign workplace exemption, was added to the FLSA).

ployees were entitled to protection even though they worked overseas.[48] However, after this case was decided, Congress immediately passed section 213(f) of the FLSA to prohibit the use of the FLSA extraterritorially. Recall that section 213(f) is the foreign workplace exemption. In essence, The Seventh Circuit found in *Pfeiffer* that Congress, by enacting the foreign workplace exemption, showed great hostility to the Court's attempt to allow extraterritorial application of the FLSA in *Vermilya-Brown Co., Inc.* In *Pfeiffer*, the Seventh Circuit used this action of Congress as a further reason for adhering to the presumption that the FLSA cannot be used abroad.[49]

With this historical background in mind, the district court in *Cruz* was very reluctant to afford protection of the FLSA to foreign seamen working on a reflagged American vessel which had never entered a U.S. port. However, *Cruz* differs from the facts of *Pfeiffer* in some significant ways which show that the presumption against extraterritorial application of the FLSA does not apply in *Cruz*.

2. *Cruz Case: The Presumption Does Not Apply*

Unlike *Pfeiffer*, *Cruz* does not deal directly with applying sections of the FLSA in another country. The issue in *Cruz* was whether foreign seamen could claim benefits under the FLSA while working on American reflagged ships. Therefore, the presumption set forth in *Pfeiffer* is not on point. As originally passed, the FLSA exempted from the minimum wage requirement "any employee employed as a seaman."[50] In 1961, Congress amended the FLSA so that seamen employed on American vessels were protected under the Act.[51] An "American vessel" is defined as "includ[ing] any vessel which is documented or numbered under the laws of the United States."[52] In *Cruz*, the eleven reflagged vessels were registered under the laws of the United States so that the ships could fly the American flag.[53] The reflagged tankers could have arguably met the definition of an "American vessel" under the FLSA.

Because the FLSA in *Cruz* was not to be applied in a foreign country, but rather on American reflagged vessels, the presumption that the FLSA cannot be utilized overseas clearly does not apply. In fact, the Third Circuit stated,

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48. *Id.* at 377.
49. *Pfeiffer*, 755 F.2d at 559.
50. *See* 29 C.F.R. § 783.28 (1990).
51. *Cruz*, 932 F.2d at 225.
52. 29 U.S.C.A. § 203(p) (West 1978).
53. *Cruz*, 932 F.2d at 225.

> [T]he Supreme Court [has] invoked the canon of . . . statutory construction that legislation is presumed not to apply 'beyond places over which the United States has sovereignty or has some measure of legislative control' unless a contrary intent appears. Because the United States has sovereignty over American-flag vessels . . . this canon . . . does not apply here.[54]

Therefore, the presumption of *Pfeiffer* is not directly applicable and the issue becomes whether a statutory interpretation or choice of law analysis is appropriate to determine the international scope of the FLSA. With this factual backdrop in mind, this casenote will now examine the holding of the district court in *Cruz*.

III. CRUZ DECISION

A. *District Court Decision*

In *Cruz*, the district court held that the Filipino seamen could not claim benefits under the FLSA. In arriving at this decision, the district court reasoned that a choice of law analysis was needed to establish which body of law should apply.[55] Possible choices were American, Filipino, or Kuwaiti law. Because the Filipino seamen only alleged a claim under the FLSA, they were left without a remedy when the court decided that American law did not apply.[56]

In their argument to the court, the Filipino seamen contended that the FLSA governed the dispute. In contrast, the defendant companies argued that U.S. law did not apply[57] under a choice of law test set out in *Lauritzen v. Larsen*[58] and *Hellenic Lines Ltd. v. Rhoditis*.[59] Like *Cruz*, these cases dealt with the application of an American statute to foreign seamen serving on vessels.[60] The two cases together set out an eight-factor test to determine whether the United States has a sufficient interest in the litigation to apply its law.[61] The eight factors of the *Lauritzen-Rhoditis* test include the place of the wrongful act, the law of the flag, the allegiance or domicile of the injured, the allegiance of the shipowner, the place of contract, the inaccessibility of a foreign forum,

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54. *Id.* at 235, n.1.
55. *Cruz*, 738 F. Supp. at 815.
56. *Id.*
57. *Id.* at 816.
58. 345 U.S. 571 (1953).
59. 398 U.S. 306 (1970).
60. *Cruz*, 738 F. Supp. at 816.
61. *Id.* at 816-17.

the law of the forum, and the shipowner's base of operations.[62] Ultimately, in *Cruz* the district court held that under the *Lauritzen-Rhoditis* choice of law analysis, American law did not apply.[63]

In *Cruz*, the district court did not discuss a statutory interpretation analysis of the FLSA.[64] The district court reasoned that the use of the *Lauritzen-Rhoditis* choice of law test was appropriate because when a claim is filed concerning the use of American law regarding admiralty cases, Congress intended that the federal courts apply a "seasoned body of maritime law" that "reconcil[es] our own [law] with foreign interests."[65] Because one issue on appeal to the Third Circuit in *Cruz* was whether the *Lauritzen-Rhoditis* choice of law test was properly used, a review of *Lauritzen* and *Rhoditis* is necessary to analyze the Third Circuit's decision.

1. *Lauritzen v. Larsen: Setting Up a Choice of Law Test*

The eight-factor choice of law[66] test used by the district court in *Cruz* derives from the U.S. Supreme Court decision in *Lauritzen*. In

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62. *Lauritzen*, 345 U.S. at 583-92; *Rhoditis*, 398 U.S. at 309.

63. The district court also held as an alternative holding that even if the FLSA did apply, the plaintiff seamen were not entitled to relief under the Act because they were not engaged in commerce, nor did the defendants constitute an enterprise engaged in commerce. *Cruz*, 738 F. Supp. at 809. To be covered by the FLSA, seamen must meet the statutory requirements. First, the seamen should be engaged "in commerce" or employed by an "enterprise engaged in commerce." *See* 29 U.S.C. § 206(a). The plaintiffs contended that a ship was considered part of the territory of the nation of the flag it flies; therefore, all trading done by the American-flagged vessels would be commerce. *Id.* at 819. The district court rejected this argument by stating that "ship as territory" terminology is a legal fiction used by the courts to resolve choice of law questions. The district court reasoned that this makes the plaintiffs' contention regarding the reflagged vessels insufficient to bring it within the commerce requirement. *Id.* The district court also held that plaintiffs failed to show that the defendants constitute an enterprise engaged in commerce. *Id.* at 821. In addition, the district court also held that the Filipino seamen were not entitled to the protection because they came under the foreign workplace exception found in the FLSA. 29 U.S.C. § 213(f).

64. *See generally Cruz*, 738 F. Supp. at 809-16.

65. *Lauritzen*, 345 U.S. at 577.

66. The district court conducted the following choice of law analysis to conclude that American law did not apply. The district court noted that the place of the wrongful act was either in the Philippines, where the employment contract was entered into, or in Kuwait, Europe and Japan, where the seamen were paid. *Cruz*, 738 F. Supp at 816. Also, while the law of the flag favored applying the law of the United States, the allegiance of the seamen was to the Philippines. *Id.* Pursuant to their employment

that case, the Court considered the applicability of the Jones Act[67] to foreign seaman working on foreign ships.[68]

The facts of the case are rather simple. While temporarily in New York, a Danish seaman joined the crew of a ship of Danish flag owned by a Danish citizen. Later, the seaman was negligently injured aboard the ship while engaged within the scope of his employment in a Havana harbor. The seaman sued the ship's owner in an American federal district court pursuant to the Jones Act.[69]

In pertinent part, the Jones Act provides that "'[a]ny seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law. . . .'"[70] The Court noted that if the Jones Act were read literally, Congress had extended American law to all alien seamen injured anywhere in the world.[71] Like *Cruz*, the key issue in *Lauritzen* was whether a U.S. statute should be applied to a maritime incident.[72]

Such liberal language in the Jones Act presented a problem of statutory interpretation for the Court as to whether the Act was intended to be applied to foreign events.[73] The Court stated,

> Congress could not have been unaware of the necessity of construction imposed upon courts by such generality of language and was well warned that in the absence of more definite directions than are contained in the Jones Act it would be applied by the courts to foreign events, foreign ships and foreign seamen only in accordance with the usual doctrine and practices of maritime law.[74]

Because the Jones Act did not provide any jurisdictional limitation on its face, the Court was forced to use choice of law principles governing maritime tort claims to decide whether American law applied.[75]

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contracts, the seamen had access to the Philippines' courts to air their grievances. *Id.* at 817. The district court also noted that application of the American minimum wage to the crews of the reflagged ships would directly conflict with Philippine regulations. *Id.* Thus, American law did not apply.

67. *See* 46 U.S.C.A. § 688 (West Supp. 1992).
68. *Lauritzen*, 345 U.S. at 571.
69. *Id.* at 571.
70. 46 U.S.C.A. § 688.
71. *Lauritzen*, 345 U.S. at 578.
72. *Id.* at 573.
73. *Cruz*, 932 F.2d at 224.
74. *Lauritzen*, 345 U.S. at 581.
75. *Cruz*, 932 F.2d at 224.

The Court included in the choice of law analysis the following factors: 1) the place of injury; 2) the country of the ship's flag; 3) the allegiance or domicile of the injured seamen; 4) the allegiance of the shipowner; 5) the place of contract 6) the inaccessibility of a foreign forum; 7) and the law of the forum.[76] After applying the test,[77] the Court determined that the Danish seaman was not entitled to protection under the Jones Act.[78]

2. *Hellenic Lines Ltd. v. Rhoditis*: *The Final Element of the Choice of Law Test*

The final factor added to the *Lauritzen-Rhoditis* choice of law test derived from *Rhoditis*.[79] Like *Lauritzen*, Rhoditis also stemmed from a case involving the Jones Act.[80] The eighth factor added by the Supreme Court to the choice of law test is "considering the shipowner's base of operation."[81]

In *Rhoditis*, the Court was again faced with the expansive language of the Jones Act and whether Congress intended for the Act to be

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76. *Lauritzen*, 345 U.S. at 583-91.

77. The following commentary is a detailed explanation of the choice of law factors in the *Lauritzen* case. The "place of the wrongful act" factor is the solution most commonly accepted by courts in tort actions. The rule is to apply the law of the place where the acts giving rise to the liability occurred, the *lex loci delicti commissi*. *Id.* at 583. The "law of the flag" factor gives cardinal importance to the law of the flag of the ship. Each state under international law may determine for itself the conditions on which it will grant its nationality to a merchant ship, thereby accepting responsibility for it and acquiring authority over it. *Id.* at 584. The "allegiance or domicile of the injured" factor considers that each nation has a legitimate interest that its nationals and permanent inhabitants are not injured. *Id.* at 586. The "allegiance of the defendant shipowner" factor examines the theory that a state or country is not debarred by any rule of international law from governing the conduct of its own citizens upon the high seas or even in foreign countries, but only when the rights of other nations are not infringed. *Id.* at 587. The "place of contract" factor is fairly self explanatory. In essence, the law of the country where the contract was made governs the case. *Id.* at 588. The "inaccessibility of a foreign forum" factor examines whether justice requires adjudication under a particular country's law to save seamen expense and loss of time in returning to a foreign forum. *Id.* at 589-90. Finally, the "law of the forum" factor states that if a forum has perfected its jurisdiction over the parties and defendant does more or less frequent and regular business within the forum state, the forum state should apply its own law to the controversy. *Id.* at 590.

78. *Id.* at 593.

79. *Rhoditis*, 398 U.S. at 306.

80. *Id.*

81. *Id.*

applied to foreign events. A Greek seaman, employed under a Greek contract, sought recovery under the Jones Act for injuries he suffered on a Greek ship while in American territorial waters.[82] The significant factor noted by the Court was that the ship was operated by a defendant whose largest offices were in New York and New Orleans and whose stock was owned by a U.S. domiciliary.[83] The Supreme Court held that under a choice of law analysis, the Jones Act was applicable to the Greek seaman because the owner's primary base of operations was in the United States.[84] Thus, the Supreme Court added the eighth factor to the *Lauritzen-Rhoditis* test.

Together, these two Supreme Court cases formed the *Lauritzen-Rhoditis* choice of law test used by the district court in *Cruz* to hold that the FLSA did not apply to the Filipino seamen. The Filipino seamen appealed their case to the Third Circuit.[85] Even though the Third Circuit affirmed the district court's ruling, the Third Circuit contended that the FLSA did not apply to the foreign seamen based on a statutory interpretation analysis, rather than on a choice of law analysis.

B. *Third Circuit Decision*

The Third Circuit affirmed the district court's opinion in *Cruz*; therefore, once again the Filipino seamen on the American reflagged vessels were not covered by the FLSA.[86] The Third Circuit, however, delivered a split opinion. While the concurring opinion affirmed on the *Lauritzen-Rhoditis* choice of law analysis employed by the district court, the judge writing the main opinion for the Third Circuit affirmed on different grounds.[87] He used a statutory interpretation instead of a choice of law analysis to examine the applicability of the FLSA.[88]

In *Cruz*, the Third Circuit offered two reasons in support of its holding that a statutory interpretation analysis is the appropriate method to determine whether the FLSA may be used overseas. First, the Third

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82. *Id.*
83. *Id.*
84. *Id.*
85. *Cruz*, 932 F.2d at 218.
86. *Id.* at 220.
87. *Id.*
88. Despite the fact that the Third Circuit used a statutory interpretation analysis, the Third Circuit held that the foreign seamen were not engaged in commerce nor were they employed by an enterprise engaged in commerce covered by the FLSA; therefore, the FLSA did not protect the seamen. *Cruz*, 932 F.2d at 226-32.

Circuit opined that, unlike the Jones Act in *Lauritzen*, the FLSA may be applied to seamen outside of the United States because the FLSA sets out within its own statutory framework the reach of the Act.[89] Second, the Third Circuit cited *Vermilya- Brown Co., Inc., Windward Shipping (London) Ltd v. American Radio Ass.*,[90] *McCulloch v. Sociedad Nacional*,[91] and *EEOC v. Arabian American Oil Co.*[92] to support the position that statutory interpretation analysis is the correct method of analysis.

1. *Scope of the Fair Labor Standards Act Within the Statutory Framework*

In *Cruz*, the Third Circuit noted that the FLSA limits its coverage of seamen within the statutory framework of the Act. As discussed earlier, the *Lauritzen-Rhoditis* choice of law test involved cases which dealt with the application of the Jones Act. Recall that the Jones Act is very broad on its face and appears to allow recovery to all foreign seamen who are injured anywhere in the world.[93] Because the language of the Jones Act is so all-encompassing, the Supreme Court used choice of law principles to determine whether American law applied in those cases.[94]

In contrast, in *Cruz* the Third Circuit opined that Congress, in enacting the FLSA, specifically considered the coverage of seamen.[95] Within the statutory framework of the FLSA, Congress imposed a two-part requirement before coverage will attach.[96] First, the seamen must be involved "in commerce" or employed by an "enterprise engaged in commerce."[97] Second, the seamen must be employed on an American vessel.[98] The Third Circuit noted that if the foreign seamen could fulfill the two-part test and no statutory exemption applied, then they should be entitled to protection under the FLSA. The Third Circuit stated that "[t]o hold otherwise would be to conclude that Congress' power to legislate is subject to the court's invocation of choice of law principles."[99]

Because the FLSA limits its application on its face, the Third Circuit reasoned that a statutory interpretation analysis was appropriate

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89. *Id.* at 224-25.

90. Windward Shipping (London) Ltd. v. American Radio Ass'n, 415 U.S. 104 (1974).

91. *McCulloch*, 372 U.S. at 10.

92. *EEOC*, 111 S. Ct. at 1227.

93. *See supra* note 70.

94. *Cruz*, 932 F.2d at 224.

95. *Id.*

96. *Id.*

97. *See* 29 U.S.C. § 206(a).

98. *Cruz*, 932 F.2d at 224.

99. *Id.*

when determining the extraterritorial application of the FLSA to seamen. The Third Circuit also cited a number of Supreme Court decisions in which the application of a federal statute overseas is a matter of statutory interpretation rather than of choice of law analysis.[100]

2. *Extraterritorial Application of a Federal Statute: A Matter of Statutory Interpretation in Case Law*

a. *Vermilya-Brown Co., Inc. v. Connell*

As previously discussed, in *Vermilya-Brown Co., Inc. v. Connell* the Supreme Court considered the issue of whether the FLSA protected employees working on a U.S. military base in Bermuda.[101] The Court analyzed the issue under a statutory interpretation analysis. Indeed, the Court stated that "[t]he point of statutory construction for our determination is as to whether the word 'possession,' used by Congress to bound the geographical coverage of the Fair Labor Standards Act, fixes the limits of the Act's scope so as to include the Bermuda base."[102] The Court held that the base constituted a possession of the United States and that it was the intent of Congress to protect the employees with the FLSA.[103] Thus, the Court looked to statutory interpretation in its analysis, not to choice of law.[104]

b. *McCulloch v. Sociedad Nacional*

As further evidence that the applicability of the FLSA is a matter of statutory interpretation rather than of choice of law, the Third Circuit also cited *McCulloch v. Sociedad Nacional*.[105] In *McCulloch*, the Supreme Court examined the use of the National Labor Relations Act[106] (NLRA) as applied to foreign vessels which made regular sailings between the United States and Latin American ports. The ships were legally owned by a foreign subsidiary of an American corporation, flew a flag of a foreign nation, carried a foreign crew represented by a foreign union,

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100. *Id.* at 224-25.

101. *Vermilya-Brown Co., Inc.*, 335 U.S. at 377.

102. *Id.* at 386.

103. *Id.*

104. In *Cruz*, the Third Circuit acknowledged that Congress later amended the FLSA to exclude such territories as Bermuda, but *Vermilya-Brown Co., Inc.* still is valuable because the Court analyzed the issue in terms of statutory interpretation and not choice of law.

105. *Cruz*, 932 F.2d at 225.

106. *See* 29 U.S.C.A. § 152 (West 1978).

and had other various contacts with the nation of its flag.[107] Even though the members of the crews were represented by a foreign union, the National Labor Relations Board stated that the crews were required to hold representation elections according to the provisions of the NLRA.[108] By asserting its authority in this manner, the Board provoked the foreign government to vigorously protest against United States interference with its shipping procedures and thereby implicitly invited the suit.[109] The foreign union appealed the Board's decision. Thus, the question for the Supreme Court was whether the coverage of the National Labor Relations Act extended to foreign crews engaged in such maritime operations.[110]

The application of U.S. law to foreign-flag ships and their crews has arisen often.[111] To determine whether the NLRA applied in these situations, the Board had developed a test balancing the relative weight of a ship's foreign contacts with its American contacts.[112] The "balancing of contacts" test used by the Board was very similar to the choice of law test employed by the Court in *Lauritzen*. After applying this balancing of contacts test in *McCulloch*, the Board determined that the actions of the foreign vessels were within the coverage of the Act and ordered the foreign crews to hold representation elections.[113]

On review, the Supreme Court reversed the holdings of the Board and rejected the Board's use of the "balancing of contacts" test to determine coverage of the NLRA.[114] In rejecting the Board's use of the "balancing of contacts" test, the Court stated that

> [s]uch activity [using the 'balancing of contacts' test] would raise considerable disturbance not only in the field of maritime

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107. *McCulloch*, 372 U.S. at 10.

108. *Id.* at 12.

109. In *McCulloch*, the National Maritime Union of America, AFL-CIO, filed a petition in 1959 with the National Labor Relations Board as the representative of the unlicensed seamen employed upon Honduran-flag vessels owned by a Honduran corporation. The Honduran corporation intervened in this process. The Honduran corporation pointed out that the seamen were required to sign Honduran shipping articles, and their wages, terms and condition of employment were controlled by a bargaining agreement between the Honduran corporation and a Honduran union. *Id.* 372 U.S. at 13.

110. *Id.* at 12.

111. *See generally* Boczek, Note, *Flags of Convenience*, 69 YALE. L.J. 498, 506-11 (1960).

112. *McCulloch*, 372 U.S. at 17.

113. *Id.*

114. *Id.* at 18 (holding that the National Labor Relations Board did not have jurisdiction over the dispute).

> law but in our international relations as well. In addition, enforcement of Board orders would project the courts into application of the sanctions of the Act to foreign-flag ships on a purely ad hoc weighing of contacts basis. This would inevitably lead to embarrassment in foreign affairs and be entirely infeasible in actual practice. The question, therefore, appears to be more basic; namely, whether the Act as written was intended to have any application to foreign registered vessels employing alien seamen.[115]

The Court stated that a statutory interpretation analysis was the proper approach to determine the scope of the statute.[116] The Court found that in order for the Board to have jurisdiction, the acts of the foreign entities needed to fit within the coverage of the National Labor Relations Act.[117] Thus, the Court looked to statutory interpretation to determine the international scope of the Act, not to a choice of law analysis.[118]

c. *Windward Shipping (London) Ltd. v. American Radio Ass'n*

The Third Circuit also cited *Windward Shipping (London) Ltd. v. American Radio Ass'n*, another case that adhered to the use of statutory interpretation as opposed to a choice of law analysis. In *Windward*, the Supreme Court was faced with the application of the Labor Management Relations Act (LMRA) to American unions picketing foreign ships which employed foreign nationals.[119]

The Court went directly to the language of the LMRA to determine whether the facts of the case and the actions of the picketers fit within the coverage of the Act. The Court also looked to the legislative history of the Act.[120] The Court again used a statutory interpretation analysis instead of choice of law principles.[121]

d. *EEOC v. Arabian American Oil Co.*

In *EEOC v. Arabian American Oil Co.*,[122] although it did not concern foreign nationals as in *Cruz*, the Supreme Court held that under a

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115. *Id.*

116. 29 U.S.C.A. § 152(6).

117. *McCulloch*, 372 U.S. at 15-16.

118. *Id.* (noting the use of the "balancing of contacts" test is not foreclosed in a different context such as the Jones Act in *Lauritzen*).

119. *Windward*, 415 U.S. at 104.

120. *Id.*

121. The Court ultimately held that the actions of the picketers were not within the coverage of the LMRA. *Id.*

122. *EEOC*, 111 S. Ct. at 1227.

statutory interpretation analysis, Title VII of the Civil Rights Act of 1964 was not applicable to U.S. citizens employed abroad by American employers.[123]

In *EEOC*, a naturalized U.S. citizen born in Lebanon and working in Saudi Arabia was discharged by his employer, Arabian American Oil Company.[124] The employee in turn filed a suit against the company under Title VII. Title VII, similar to the FLSA, subjects employers to its terms if the employer is "engaged in an industry affecting commerce."[125] The Court defined the issue as "determin[ing] whether Congress intended the protections of Title VII to apply to United States citizens employed by American employers outside of the United States."[126] The Court actually described its task to be one "of statutory construction."[127] Indeed, the Court did not even consider approaching the issue from a choice of law approach.[128] Therefore, in *Cruz*, all of the case law cited by the Third Circuit supported its holding that a statutory interpretation analysis was correct.

IV. ANALYSIS OF THE CRUZ DECISION

In *Cruz v. Chesapeake Shipping Inc.*, the Third Circuit rejected the district court's use of a choice of law analysis to determine whether the FLSA applied to the Filipino seamen on the American reflagged ships.[129] Rather, the Third Circuit used a statutory interpretation analysis to reach its conclusion.[130]

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123. *Id.*

124. *Id.*

125. *Id.* at 1231.

126. *Id.* at 1230.

127. *Id.*

128. *Id.* at 1227-28 (Supreme Court held that Title VII did not apply extraterritorially to regulate the employment practices of U.S. firms that employ American citizens abroad. The employee's evidence, while not totally lacking in probative value, fell short of demonstrating the clearly expressed affirmative congressional intent that is required to overcome the well-established presumption against statutory extraterritoriality. The employee argued unpersuasively that Title VII's "broad jurisdictional language" which extended the Act's protections to commerce "between a State and any place outside thereof" evinced a clear intent to legislate extraterritorially. The language relied on was ambiguous, did not speak directly to the question presented, and constituted boilerplate language found in any number of congressional acts, none of which had been held to apply overseas).

129. *Cruz*, 932 F.2d at 219.

130. *Id.*

The Third Circuit supported its analysis with two findings. First, the Third Circuit opined that the statutory framework of the FLSA limits its applicability by imposing certain requirements.[131] [132] The Third Circuit reasoned that if foreign seamen could fulfill the rigorous statutory requirements of the FLSA, then the seamen should be extended the protection of the Act. Second, the Third Circuit found that a statutory interpretation analysis was appropriate based on case law. The Third Circuit cited *Vermilya-Brown Co., Inc.*, *EEOC*, *Windward Shipping (London) Ltd.*, and *McCulloch*.[133] In all of these decisions, the Supreme Court used a statutory interpretation method rather than a choice of law analysis to determine the international scope of a federal statute.

The concurring judge in *Cruz*, who advocated the use of a choice of law approach, challenged the main opinion's analysis by citing *EEOC*.[134] The concurring judge stated that *EEOC*, which held that Title VII does not apply overseas, stands for the presumption discussed earlier in this casenote that congressional legislation is presumed to apply only within the United States unless one can show a "clearly expressed" and "affirmative" intent to the contrary.[135] The concurring judge noted that the FLSA does not contain specific words, such as conflicts of law text, to show that Congress intended for it to be applied extraterritorially.[136] The concurring judge stated that "[i]f Congress had intended to resolve conflicts between the FLSA and other nations' labor laws in favor of American law, it was required to draft the FLSA in a manner which affirmatively and clearly expressed such intent."[137] The concurring judge reasoned that without such an intent, a choice of law analysis was required in *Cruz* to determine whether the FLSA could be applied overseas to foreign seamen.

The concurring judge is incorrect for relying on *EEOC* to support a choice of law analysis.[138] In *EEOC*, it was appropriate for the Supreme Court to utilize the presumption that a federal statute does apply abroad because in that case the plaintiff sought to apply Title VII in a foreign

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131. *Id.* at 224.

132. Recall that according to 29 U.S.C.A. § 206(a), the seamen must be engaged in commerce or involved in an enterprise affecting commerce. Also, the seamen must be on an American ship. *Cruz*, 932 F.2d at 225.

133. *Cruz*, 932 F.2d at 224-25.

134. *Id.* at 234.

135. *Id.*

136. *Id.*

137. *Id.* at 234-35.

138. *EEOC*, 111 S. Ct. at 1242.

country, Saudi Arabia.[139] As discussed earlier, unlike *EEOC*, in *Cruz* the Filipino seamen did not seek to apply the FLSA in a foreign country, but rather on American reflagged vessels. Thus, the presumption does not apply to *Cruz*.[140] The concurring judge's reliance on *EEOC* to support the application of the presumption is untenable because *EEOC* and *Cruz* are factually distinguishable.

The concurring judge also stated that the *Lauritzen-Rhoditis* choice of law test was appropriate because the "Supreme Court has recognized that . . . *Lauritzen* . . . was 'intended to guide courts in the application of maritime law generally.'"[141] However, the cases cited by the concurring judge to support his theory employed the use of the Jones Act.[142] As discussed earlier in this casenote, the Jones Act appears on its face to apply indiscriminately to all foreign seamen.[143] The Court looked to the statutory interpretation of the Jones Act and found it to be vague. Because the Jones Act itself did not provide any limitation to its application, a choice of law analysis was appropriate.[144] In *Cruz*, however, the FLSA does impose requirements within its statutory framework with regards to seamen. The district court even noted that

> [u]nlike the Jones Act, however, the FLSA is self-limiting on its face. It does not profess to apply to all seamen on the high seas . . . Thus, some of the concerns that led to the formulation of the *Lauritzen-Rhoditis* test are lacking when construing the FLSA.[145]

In sum, the FLSA does not require the application of choice of law principles because the FLSA's language excludes that possibility. Case law also supports this finding. If the FLSA's coverage of seamen on American vessels depended upon weighing the eight factors relevant to the choice of law analysis, the congressional intent of the FLSA would be thwarted.[146] Therefore, the concurring judge's support of choice of law test is incorrect.

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139. *Id.* at 1227.

140. *Cruz*, 932 F.2d at 235, n.1.

141. *Id.* at 234 (quoting Romero v. International Terminal Operating Co., 358 U.S. 354, 382 (1959)).

142. *Lauritzen*, 345 U.S. at 571; *Romero*, 358 U.S. at 354; *Rhoditis*, 398 U.S. at 306.

143. *See* 46 U.S.C.A. § 688.

144. *Cruz*, 932 F.2d at 224.

145. *Cruz*, 738 F. Supp. at 818.

146. *Cruz*, 932 F.2d at 237. For a discussion of the statutory interpretation analysis of the FLSA used by the Third Circuit, see *Cruz*, 932 F.2d at 224-38.

V. CONCLUSION

In *Cruz*, the Third Circuit properly held that a statutory interpretation method will be the correct analysis when determining whether the FLSA is applied overseas to foreign seamen on American reflagged vessels. The position held by the district court and the concurring judge of the Third Circuit which advocates a choice of law analysis raises questions of legal accuracy when applied to FLSA coverage of foreign seamen. In short, *Cruz* sets out the proper procedure for reviewing international coverage of the FLSA with regard to seamen, a statutory interpretation analysis.

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